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**Local 342-50, United Food and Commercial Workers Union, AFL-CIO and Pathmark Stores, Inc.**  
Cases 29-CB-11732 and 29-CB-11732-2

May 30, 2003

**DECISION AND ORDER**

BY MEMBERS LIEBMAN, SCHAUMLER, AND ACOSTA

On November 1, 2002, Administrative Law Judge Howard Edelman issued the attached decision and order. The Respondent has filed exceptions and a supporting brief. Neither the General Counsel nor the Charging Party has filed exceptions or an answering brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and record in light of the exceptions and brief and has decided to affirm the judge's rulings, findings,<sup>1</sup> and conclusions only to the extent consistent with this Decision and Order.

**I. INTRODUCTION**

There are two issues in this case. The first issue is whether the judge properly found that the Respondent Union violated Section 8(b)(1)(B) of the Act by declaring to the Employer on October 10 and 15, 2001, that the Union would not meet with the Employer's human resources director unless the meeting, including specifically "Step Two" grievance meetings, was tape-recorded.<sup>2</sup> The second issue is whether the judge properly found that the Union violated Section 8(b)(3) on November 5, 2001, by insisting on tape recording Employer-employee meetings held to explain a lawsuit the Employer had filed against the Union. We affirm the judge's 8(b)(1)(B) finding, but reverse his 8(b)(3) finding.

**II. THE FACTS**

The parties have had a longstanding collective-bargaining relationship. In late 2001, however, their relationship was strained by an ongoing dispute over the

<sup>1</sup> The judge found that shop stewards Civitella and O'Connor were agents of the Respondent. He relied on the fact that the Respondent admitted the agency relationships in its answer to the complaint. We affirm the judge's finding for the same reason. Thus, we find it unnecessary to pass on the judge's additional statement that position papers submitted by an attorney for a party also are admissible as admissions.

<sup>2</sup> The complaint alleged that this conduct also violated Sec. 8(b)(3), but the judge did not address this allegation and, again, neither the General Counsel nor the Employer has filed exceptions. Accordingly, this allegation has been waived. See Sec. 102.46(b)(2) of the Board's Rules and Regulations.

Employer's decision to stock its grocery stores with pre-packaged meat products.

In particular, the Union's field director, Kelly Egan, and executive vice president, Lisa O'Leary, became increasingly disenchanted with the Employer's Human Resources Director, John Padian. On October 10,<sup>3</sup> Field Director Egan sent Padian a letter, stating in pertinent part:

With this letter I am notifying you that I have instructed the Business Agents/Union Representatives who represent Pathmark members in Local 342-50 and 174<sup>4</sup> they may communicate with you in one of two ways:

1. in writing
2. conversations that are tape recorded

If there are any telephone conversations between you and the union staff, those conversations will be taped, and the Rep will tell you that is the case. If there are any meetings with you and the union staff representatives, the Union Rep will tell you the meeting is being recorded, and will place the tape recorder on the table. If you refuse to participate in a taped conversation, then the Union Rep will end the meeting and attempt to communicate by mail. If you refuse to do "Step Two" of the grievance procedure on tape or by mail, the Union will proceed to the next step.

....

All communications with you from now on will be documented.

On October 15, Executive Vice President O'Leary sent her own letter to Padian, declaring in pertinent part:

From now on, no Local 342-50 or Local 174 Rep will speak with you unless the conversation is on tape. I have decided to do the same.

O'Leary's letter included the following postscript: "Please do not write to me concerning this letter or the subject matter. Its [sic] over, and I have real work to do."

The Employer responded to Egan's and O'Leary's letters within a matter of days by filing the unfair labor practice charges underlying the complaint. In the meantime, Human Resources Director Padian, when he had occasion to speak or meet with a union representative, asked if he was being tape-recorded and/or advised the union representative that he, Padian, objected to being recorded. Padian proceeded only after being assured that

<sup>3</sup> All dates are in 2001, unless stated otherwise.

<sup>4</sup> Local 174 was later merged into Local 342-50.

the conversation was not being tape-recorded. As it turned out, no union representative, including Egan and O'Leary, actually insisted on tape recording a conversation with Padian.

On about October 31, Shop Steward Joe Civitella, the Union's representative assigned to the Employer's Shirley Avenue store, advised Store Manager Anthony Armellino that he, Civitella, and other shop stewards had been issued tape recorders by the Union and instructed to tape-record any official conversations with the store managers. Civitella then showed Armellino a tape recorder. Nothing more came of this conversation at the time.<sup>5</sup>

At some point prior to November 5, the Employer decided to hold meetings with unit employees to explain that the Employer had filed a lawsuit against the Union concerning the latter's actions relating to the prepackaged meat dispute.<sup>6</sup> On November 5, the Employer's vice president of operations, Mark Kramer, held a conference call with the managers of the Employer's stores which had union-represented employees. Kramer instructed the managers to meet with unit employees that day to explain the lawsuit. The Employer did not authorize the store managers to negotiate over the lawsuit. Each manager was provided with a written script and a written question-and-answer sheet, and was instructed not to deviate from either one. Kramer further instructed the managers that, if confronted with a question not appearing on the question-and-answer sheet, they should advise the employees that the question would be passed along to upper management. The store managers also were instructed to ask if the meeting was being recorded.

The store managers carried out the meetings on November 5 as instructed, though not without incident. At the Employer's Shirley Avenue store, Store Manager Anthony Armellino opened his meeting by asking if he was being tape-recorded. Shop Steward Joe Civitella disclosed that he was going to tape-record the meeting. Armellino specifically objected, saying he "didn't want to be taped." Civitella said he understood, but that "he had to tape it." Civitella then turned on his tape recorder

and Armellino proceeded with the meeting. Armellino read his prepared materials and, using the scripted question-and-answer sheet, responded to employees' questions, which mainly concerned the lawsuit and its potential impact on their job security. The meeting lasted approximately ten minutes.

At the Employer's Forest Avenue store, managed by Richard DiCosmo, shop steward Joanne O'Connor approached DiCosmo as he was preparing to begin his meeting and advised him that she intended to tape-record the meeting. DiCosmo told O'Connor that he would not permit it. O'Connor responded that she had to make a phone call and left the room.<sup>7</sup> DiCosmo began the meeting, but O'Connor returned moments later and instructed the unit employees that there was no need for them to remain in the meeting. DiCosmo confirmed that the employees could stay or leave. O'Connor then waited by the door to the meeting room as most of the employees departed. A few employees remained in the room and DiCosmo read his script as instructed. It is unknown whether O'Connor actually tape-recorded the meeting.

### III. THE JUDGE'S DECISION

The judge found that the Union's October 10 and 15 letters unconditionally demanded that all conversations and meetings between Human Resources Director Padian and union representatives be tape-recorded, and that the Union threatened to circumvent the parties' contractual grievance procedure if the Employer refused to accept this condition. The judge specifically found that the Union's action adversely affected Padian's ability to perform his grievance-related duties for the Employer and therefore was a "flagrant violation" of Section 8(b)(1)(B).

Turning to the November 5 store meetings, the judge found that the purpose of the meetings was to discuss the Employer's decision to sell prepackaged meat. The judge pointed out that the Union had filed grievances over this decision and found that the meetings involved matters covered by Section 8(d). The judge also analogized the November 5 meetings to grievance meetings and found that the Union violated 8(b)(3) when Shop Stewards Civitella and O'Connor insisted on tape recording the meetings.

<sup>5</sup> Store Manager Armellino did not testify that he told anyone else about his October 31 discussion with Civitella.

<sup>6</sup> The judge found that "the purpose of such meetings was to discuss and answer questions about the Employer's decision to use prepackaged meat, which was the subject of a grievance filed by the Union." The Respondent has excepted to this finding, arguing that the record clearly establishes that the purpose of the meetings was to explain only the Employer's decision to commence legal proceedings against the Union. We find merit in this exception. Even Human Resources Director Padian agreed that this was the purpose of the meetings, and there is no evidence to show that the meeting was conducted for any other purpose.

<sup>7</sup> The record does not indicate whether O'Connor actually called or spoke with anyone.

## IV. ANALYSIS

A. *The Union Violated Section 8(b)(1)(B)*

We agree with the judge that the Union violated Section 8(b)(1)(B),<sup>8</sup> in its October 10 and 15 letters, by threatening not to deal with the Employer's representative, Padian, unless the meeting were tape-recorded. Padian's status as the Employer's representative for purposes of grievance adjustment and collective bargaining is undisputed. It is clear, in turn, that the Union's letters were directed at Padian's performance of his 8(b)(1)(B) duties. The only issue, then, is whether the Union's conduct tended to "adversely affect" Padian's performance of his covered duties, the test of indirect restraint or coercion of an Employer in the selection of its representative. See *American Broadcasting Cos. v. Writers Guild of America*, 437 U.S. 411, 429–430 (1978); *Florida Power & Light Co. v. Electrical Workers Local 641*, 417 U.S. 790, 804–805 (1974); *San Francisco-Oakland Mailers' Union No. 18 (Northwest Publications)*, 172 NLRB 2173, 2173–2174 (1968).

We find that it did. The prospect of meetings being tape-recorded, and the need to seek assurances that he was not being tape-recorded, surely tended to formalize Padian's dealings with union representatives and to inhibit the type of spontaneous, informal discussion that is essential to the grievance-adjustment process. Cf. *Pennsylvania Telephone Guild (Bell Telephone)*, 277 NLRB 501 (1985), *enfd.* 799 F.2d 84 (3d Cir. 1986) (finding that union's insistence on tape recording grievance meetings violated Section 8(b)(3)).<sup>9</sup> Furthermore, the Union's conduct effectively forced the Employer to choose between limiting Padian's service in favor of another representative who had not been targeted by the Union or accepting Padian's continued, but now encumbered, representation. Thus, the Employer was denied its statutory right to "an unimpeded choice of representatives for collective bargaining and settlement of grievances." *San Francisco-Oakland Mailers' Union No. 18 (Northwest Publications)*, 172 NLRB at 2174.

We reject the Union's contentions that: (1) its letters lawfully "proposed" or "demanded" that all conversations and discussions with Human Resources Director Padian be tape-recorded and that the General Counsel failed to show that it insisted on this proposal; and (2) there never was any "restraint or coercion" of Padian in connection with his collective-bargaining duties inas-

much as no union representative ever refused to meet with Padian unless the meeting was tape-recorded.

Contrary to the Union's contention that its October 10 and 15 letters merely proposed or demanded that all conversations between Padian and union representatives be tape-recorded, we find that the Union unequivocally threatened not to meet with Padian unless he acquiesced in the Union's final decision to tape-record such meetings. Thus, Field Director Egan's October 10 letter to Padian states, "With this letter I am notifying you that I *have instructed* the Business Agents/Union Representatives. . . ." The remainder of Egan's letter informed Padian how the Union *will* communicate with him. Similarly, Executive Vice President O'Leary's October 15 letter declared, "From now on, no Local 342-50 or Local 174 Rep will speak with you unless the conversation is on tape. I *have decided* to do the same."<sup>10</sup> To remove any doubt that O'Leary considered the matter closed, she added, "Please do not write to me concerning this letter or the subject matter. Its [sic] over, and I have real work to do." Based on these declarations, we find that the Union's October 10 and 15 letters, far from inviting discussion with the Employer, unequivocally threatened not to deal with Padian in the absence of a tape-recording device.

We also reject the Union's contention that there was no "restraint or coercion" of the Employer in its selection of Padian as its representative because no union representative actually insisted on tape-recording conversations with Padian and he never was prevented from meeting with union representatives. This argument ignores the inhibiting impact of Egan's and O'Leary's letters on Padian's representation of the Employer in conversations and meetings with union representatives, as already described. The Union's position implies that proof of actual harm to a representative's performance of his duties is required under Section 8(b)(1)(B). No such requirement exists. See *American Broadcasting Cos. v. Writers Guild of America*, 437 U.S. 411, 432 (1978) (explaining that "whether union conduct would or might adversely affect the performance of the [representative's] grievance-adjustment duties is, as the petitioners assert, *necessarily a matter of probabilities*") (emphasis added). Thus, it is immaterial that the Employer pressed on with Padian as its representative, notwithstanding the infringement on its right to enjoy his unfettered representation. See *American Federation of Musicians Local 76 (Jimmy Wakely Show)*, 202 NLRB 620 (1973) (explaining that it does not matter if the coercion succeeded or failed).

<sup>8</sup> Sec. 8(b)(1)(B) provides that "It shall be an unfair labor practice for a labor organization or its agents . . . to restrain or coerce . . . an employer in the selection of his representatives for the purposes of collective bargaining or the adjustment of grievances".

<sup>9</sup> See fn. 2, *supra*.

<sup>10</sup> Emphasis added in each statement.

For all of these reasons, we find that the Union violated Section 8(b)(1)(B) by unequivocally threatening not to hold any meetings, including certain grievance meetings, with Human Resources Director Padian unless the meetings were tape-recorded.

*B. The Union Did Not Violate Section 8(b)(3)*

Contrary to the judge, we find that the Union did not violate Section 8(b)(3)<sup>11</sup> by insisting on tape-recording the Employer's November 5 store meetings with unit employees. The Union contends that a refusal-to-bargain violation may not be predicated on the November 5 meetings because the meetings had nothing to do with bargaining. For the following reasons, we agree.

As described above, Human Resources Director Padian and Store Managers Armellino and DiCosmo testified without contradiction that the November 5 meetings were simply scripted information sessions designed to inform unit employees of the Employer's lawsuit against the Union and to explain why it had been filed. Accordingly, as the Union points out, the Employer directed its store managers to schedule the meetings with the unit employees. The store managers then included the Union's shop stewards in the meetings solely by virtue of their status as unit employees. Thus, no one from the Union, in the role of a collective-bargaining representative, was present at any of these meetings.

Indeed, the Employer did not authorize its own store managers to engage in bargaining during the November 5 meetings. Rather, Vice President of Operations Kramer specifically instructed the store managers that they should adhere strictly to a written script and written question-and-answer sheet and that, if confronted with a question not appearing on the question-and-answer sheet, they should advise the employees that the question would be passed along to upper management. Store Managers Armellino and DiCosmo testified that they faithfully abided by these instructions.

In these circumstances, we find that the November 5 meetings cannot be considered bargaining sessions. We therefore conclude that the Union did not "refuse to bargain collectively" by insisting on tape-recording the meetings. In reaching this conclusion, we have considered the judge's supposition that the Union's conduct caused the Employer to script the November 5 meetings, thereby preempting any informal discussion between the store managers and the unit employees. Even if true, this fact would be immaterial.<sup>12</sup> Scripted or not, formal or

informal, the November 5 meetings were held only to inform unit employees of the Employer's lawsuit against the Union, not to bargain with the Union over the lawsuit. Finally, there is no evidence that, but for the Union's conduct, the Employer would have contemplated having its store managers bargain over the lawsuit, or any other matter, with the Union during the meetings.

Accordingly, we reverse the judge's finding of an 8(b)(3) violation, and we dismiss this complaint allegation.

**ORDER**

The National Labor Relations Board orders that the Respondent, Local 342-50, United Food and Commercial Workers Union, AFL-CIO, its officers, agents, and representatives shall take the following action.

1. Cease and desist from

(a) Restraining or coercing Pathmark Stores, Inc., the Employer herein, in the selection of its representatives for the purposes of collective bargaining and the adjustment of grievances by threatening not to meet with Human Resources Director Padian in his capacity as an 8(b)(1)(B) representative unless the meeting is tape-recorded;

(b) In any like or related manner, restraining or coercing the Employer in the selection of its representatives for the purposes of collective bargaining and the adjustment of grievances.

2. Take the following affirmative action to effectuate the policies of the Act.

(a) Within 14 days after service by the Region, post at its union office in Mineola, New York, copies of the attached notice marked "Appendix."<sup>13</sup> Copies of the notice, on forms provided by the Regional Director for Region 29, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to members are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material;

(b) Sign and return to the Regional Director sufficient copies of the notice for posting by Pathmark Stores, Inc., if willing, at all places where notices to employees are customarily posted.

(c) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a re-

<sup>11</sup> Sec. 8(b)(3) makes it an unfair labor practice for a labor organization "to refuse to bargain collectively with an employer".

<sup>12</sup> Member Acosta notes instead a lack of evidence that the Employer's decision to script its meetings was due to the Union's insistence on tape-recording them.

<sup>13</sup> If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

sponsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C. May 30, 2003

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Wilma B. Liebman , Member

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Peter C. Schaumber, Member

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R. Alexander Acosta, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

#### APPENDIX

##### NOTICE TO MEMBERS

POSTED BY ORDER OF THE

National Labor Relations Board

An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

*Richard Bock, Esq.*, for the General Counsel.

*Marc A. Stefan Esq. (Butsavage & Associates)*, for the Respondent.

*Marvin Goldstein, Esq. (Proskauer Rose LLP)*, for the Charging Party.

#### DECISION

##### STATEMENT OF THE CASE

HOWARD EDELMAN, Administrative Law Judge. This case was tried before me on May 15, 2002 in Brooklyn, New York.

This case began with the filing of two charges by Pathmark Stores, Inc. (the Employer). One of the charges was filed in Region 29, against Local 342-50, UFCW (29-CB-11732-1), and the other was filed in Region 2, against Local 174, UFCW (2-CB-18534).

Both Regions conducted independent, concurrent investigations, leading to the issuance of two separate complaints. The Region 29 complaint issued on January 18, 2002, and alleged that Local 342-50, UFCW, violated Sections 8(b)(3) and 8(b)(1)(B), by demanding, in writing, on or about October 10 and 15, 2001, that all verbal communication between its agents and John Padian director of human resources for Pathmark Stores, herein called the Employer, be tape recorded; and that it committed a violation of Section 8(b)(3) alone, by conditioning that certain meetings held on or about November 5, 2001, be

#### FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join or assist a union

Choose representatives to bargain with your employer on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT restrain or coerce Pathmark Stores, Inc., in the selection of its representatives for the purposes of collective bargaining and the adjustment of grievances by threatening not to meet with Human Resources Director Padian in his capacity as a collective-bargaining or grievance representative unless the meeting is tape recorded.

WE WILL NOT in any like or related manner restrain or coerce Pathmark Stores, Inc. in the selection of its representatives for the purpose of collective bargaining or adjustment of grievances.

LOCAL 342-50, UNITED FOOD AND COMMERCIAL WORKERS UNION, AFL-CIO

tape recorded. The Region 2 complaint alleged that the October 10 and 15, 2001, written demands referred to above violated Section 8(b)(3) and made no reference to the November 5, 2001, meetings.

Subsequent to the issuance of both complaints, the charge in 2-CB-18534 was transferred to Region 29, pursuant to Order issued by the General Counsel, and was renumbered as 29-CB-11732-2. The two matters were then consolidated, and tried on May 15, 2002. Prior to the commencement of the trial General Counsel amended the complaint issued by Region 2 to plead the October 10 and 15, 2001, written demands as violative of Section 8(b)(1)(B), in addition to the already-pleaded 8(b)(3) violation. Additionally, the parties stipulated that Local 342-50 and Local 174 merged on January 1, 2002, at which time, Local 342-50 changed its name to a Local 342, United Food and Commercial Workers Union, AFL-CIO (the Union). Although consideration was given to having the General Counsel conform the two complaints into one document, once the aforementioned stipulation was reached, the General Counsel was advised that the two could remain separate.

Based upon the entire record herein, including my observation of the demeanor of the witness, and the briefs submitted by Counsel for the General Counsel and Respondent I make the following findings of fact and conclusions of law. In this regard, counsel for the General Counsel submitted three witnesses, counsel for Pathmark, the Employer herein, and Counsel for the Union submitted no witnesses.

I credit the testimony of General Counsel's witnesses. I was impressed with their demeanor. They testified in a forthright

manner, and gave detailed testimony, which was consistent on both direct and cross-examination.

At all material times, the Employer, a domestic corporation with its principal office and place of business located in Carteret, New Jersey, herein called the New Jersey facility, has been engaged in the operation of retail grocery stores throughout the United States, and in the New York Metropolitan area, including those located in Shirley, New York, herein called the Shirley facility, Borough Park, New York, and Forest Avenue, Queens, New York. During the past year, the Employer, in the course and conduct of its business operations derived gross annual revenues in excess of \$500,000, and purchased and received at its New Jersey facility goods, products, and materials valued in excess of \$5000 directly from points outside the State of New York.

It is admitted the Employer is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

It is also admitted that Respondent is a labor organization within the meaning of Section 2(5) of the Act.

It is further admitted that the below-named individuals have occupied the positions set forth next to their respective names and have been agents of Respondent, acting on its behalf:

Kelly Egan	Field Director
Lisa O'Leary	Executive Vice President
Joe Civitella	Shop Steward, Shirley Facility
Joanne O'Connor	Shop Steward, Forest Avenue Facility
Anthony Venditti	Shop Steward, Borough Park Facility

It is also admitted that the below-named individuals have occupied the positions set forth next to their respective names and have been supervisors of the Employer within the meaning of Section 2(11) of the Act, and agents thereof, acting on its behalf:

John Padian	Director, Human Resources
Anthony Armellino	Store Manager, Shirley Facility
Richard DiCosmo	Store Manager, Forest Avenue Facility
Kenneth Casey	Store Manager, Borough Park Facility

Since the 1980's, Respondent has been the lawfully designated exclusive collective bargaining representative of the bargaining unit set forth below and has been recognized as such representative by the Employer. Such recognition has been embodied in successive collective-bargaining agreements, the most recent of which is effective by its terms from October 1999 through October 2003. The bargaining unit covered by these collective-bargaining agreements is set forth as follows:

All meat department heads, journeymen, apprentices, wrappers, delicatessen-appetizing department heads, delicatessen-appetizing clerks, seafood department heads, seafood clerks, B journeymen, weighers and wrappers, employed by the Employer at its stores located in: Long Island City, Queens; Atlantic Center, Brooklyn; Borough Park, Brooklyn; Cropsey Avenue, Brooklyn; Gowanus, New Jersey; Nostrand Avenue, Brooklyn; Amboy Road, Staten Island; Richmond Avenue, Staten Island; New Dorp, Staten Island; Forest Avenue, Queens; Kew Gardens, Queens; Springfield Gardens, Queens;

Whitestone, Queens; Ozone Park, Queens; Bedford Stuyvesant, Brooklyn; Garden City, Long Island; Franklin Square, Long Island; Starrett City, Bronx; Albany Avenue, Brooklyn; New Hyde Park, Long Island; Brentwood, Long Island; Bayshore, Long Island; Port Jefferson, Long Island; Patchogue, Long Island; Commack, Long Island; Islip, Long Island; Holbrook, Long Island; Shirley, Long Island; Smithtown, Long Island; Centereach, Long Island; Dix Hills, Long Island; Greenvale, Long Island; East Rockaway, Long Island; North Babylon, Long Island; Levittown, Long Island; Baldwin, Long Island; Seaford, Long Island; West Babylon, Long Island; Massapequa, Long Island; West Hempstead, Long Island; Woodbury, Long Island; East Meadow, Long Island; and Jericho, Long Island, excluding all other employees, guards and supervisors as defined in Section 2(11) of the Act.

On or about November 1999, during collective bargaining negotiations a dispute arose between the parties concerning the Employers' use of prepackaged meat, which would have the effect of diminishing the meat department employees covered by the bargaining unit.<sup>1</sup>

At some point in time a certain animosity between Union representatives and the Employers' John Padian, Director of Human Resources developed. In this connection, by a letter to Padian signed by Kelly Egan, Union Director, dated October 10, relating to the prepackaged meat dispute sets forth as follows:

With this letter I am notifying you that I have instructed the Business Agents/Union Representatives who represent the Pathmark members in Local 342-174 they may communicate with you in one of two ways:

1. In writing
2. Conversations that are tape recorded

If there are any telephone conversations between you and the union staff, conversations will be taped, and the Rep will tell you that is the case. If there are meetings with you and the union staff representative, the Union Rep will tell you the meeting is being recorded, and will place the tape recorder on the table. If you refuse to participate in a taped conversation, then the Union Rep will end the meeting and attempt to communicate by mail. If you refuse to do "Step Two" of the grievance procedure on tape or by mail, the Union will proceed to the next step.

By a letter dated October 15, 2001, and signed by Lisa O'Leary, executive vice president, the Union expanded its demand to other supervisors and or agents as follows:

RE: Improper Layoff-Arbitration-Your letter to Kelly Egan

Dear Mr. Padian:

I am answering the letter you sent to Kelly Egan, Field Director, wherein you make it appear that you and Kelly are negotiating terms outside the collective bargaining agreement. Naturally, your proposals are nonsensical:

<sup>1</sup> This dispute is discussed in a companion case wherein a decision, Pathmark Stores, Inc., JD(NY)-50-02, dated August 21, 2002 issued.

Local 342-50 rejects them out of hand. As per your MO, Ms. Egan never indicated any thing remotely close to what you have in the letter would be okay. Her mistake, which I see has since been corrected, is that Kelly has no proof of the content of the conversation. *From now on, no Local 342-50 or Local 174 Rep will speak with you unless the conversation is on tape. I have decided to do the same.*

That the Employer regarded the condition set forth in the Unions October 10 and 15 letters as unlawful is established by its' immediate filing of the charges herein filed on October 14, and 16.

Moreover, the letters had an immediate effect on Padian's dealings with Union representatives. On several occasions he had reasons to deal with union representatives Lou Liacoma, Bob Lazzaro and Lisa O'Leary. When confronted with these individuals, he asked if his conversations were going to be taped, and only when they assured him they were not, did he speak to them.

At some point in time, the Employer decided to have store meetings wherein the store managers would discuss with the employees the prepackaged meat dispute including a lawsuit filed against the Union. The Employer learned that the Union stewards who would be present at these meetings would be given tape recorders to tape each meeting. Accordingly, rather than have an open discussion and informal question and answer session, the Employer prepared a scripted speech, which the store managers conducting the meetings were to read exactly as written. As to the question and answer session, a list of expected questions and the Employers' answers was prepared. The Employers' store managers were supposed to read the answers exactly as written. There was to be no informal discussions.

On November 5 a meeting took place at the Employers' Shirley store. Store manager Amellino opened the meeting by asking if he was being taped. Union representative Civitella stated that he would be taped. Amellino stated he did not want to be taped. Civitella turned on the tape recorder. Amellino then read his prepared statement word for word. When questions were asked which were mainly about the lawsuit and job security Amellino read the prepared answers to these questions.

The same morning store manager Richard DiCosmo of the Forest Avenue, Staten Island store, prepared to conduct his meeting. Union shop steward O'Connor told him she was going to tape the meeting. DiCosmo stated that he would not permit this. O'Connor left stating that she had to make a phone call. A few minutes later she returned and told the assembled group of employees that there is no need for them to stay. With the exception of two or three employees, all the other employees left. DiCosmo then proceeded to read the prepared statement and the questions and answers word for word as printed.

#### Analysis and Conclusion

The facts establish conclusively that the Union's October 10 & 15 letters by its agents Egan and O'Leary demanded that all verbal communication between the Unions' representatives and Padian be tape recorded and any refusal to accept this condition would result in the Union circumventing certain steps of the

grievance procedure set forth in the parties collective bargaining agreement.

The Board in Teamsters Local 501 (George R. Klien News Co.), 306 NLRB 118, 120 stated:

Section 8(b)(1)(B) does not proscribe all restraint and coercion of an employer in the selection of its collective-bargaining or grievance representatives. The proscribed conduct must take one of two forms. It may be applied directly against the employer to force the employer to select or replace an 8(b)(1)(B) representative *or indirectly against the employer's 8(b)(1)(B) representative in order to adversely affect the manner in which the representative performs the covered functions of collective bargaining, grievance processing, or related activities citing Florida Power Co. v. Electrical Workers IBEW Local 641, 417 U.S. 790, 805 (1974).*

The language of the Union's October 10 and 15 letters clearly, on their face, adversely affect the manner in which the Employer's representative Padian, performs its grievance sessions. The unconditional demand is that such sessions between Padian and Union representatives must be tape recorded by its Union representatives. I find such unconditional demand to be a flagrant in violation of Section 8(b)(1)(B) of the Act.

The facts establish that when Padian had conversations with various Union representatives Lou Liacoma, Bob Lazzaro and Lisa O'Leary, following the issuance of the October letters, he always asked them if his conversations were being taped. It was only after being assured that they were not, did he engage in informal conversations with them.

With respect to the November 5 store meetings, the facts establish the purpose of such meetings was to discuss and answer questions about the Employers' decision to use prepackaged meat, which was the subject of a grievance filed by the Union and resulting legal action commenced by the Employer. Clearly, such matters are covered by Section 8(d) of the Act. In *Pennsylvania Telephone Guild (Bell Telephone Co.)*, 277 NLRB 501 (1985) the Board states:

The duty to bargain in good faith not only applies to negotiations, but to any meeting where questions arising under the collective-bargaining agreement will be discussed. Section 8(d) of the Act provides that "[the duty] to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment or the negotiation of an agreement or any question arising there under." Typically, questions arising under collective-bargaining agreements are initially addressed by the parties by means of a grievance meeting. Grievance meetings may sift out unmeritorious claims and facilitate the settlement of disputes before any formal dispute resolution forum is utilized. Thus, grievance meetings are integral parts of the collective-bargaining process which are subject to the Act's requirement of good-faith bargaining.

Respondent appears to contend in his brief that Joe Civitella who was present with a tape recorder at the Shirley store and Joanne O'Connor who was present at the Forest Avenue store were not agents of the Union. However, the Union attorney

admitted in his answer that both individuals were shop stewards, and agents of the Union.

The Board has consistently held that position papers, including an answer to a complaint submitted by an attorney for a party to the trial are admissible as admissions against the party he represents. See *Black Entertainment Television*, 324 NLRB 1161 (1997); *Steve Aloï Ford*, 179 NLRB 229 fn. 2 (1969); *Albion Poultry & Egg Co.*, 134 NLRB 827 fn. 1 (1961), and often highly probative in assessing motivation of parties and or the credibility of witnesses. *The Bond Press*, 234 NLRB 1227, 1231-1232 (1981); *Operating Engineers Local 150 (Willbros Energy Services)*, 307 NLRB 272, 275 (1992); *Dimensions in Metal*, 258 NLRB 563, 576-577 (1981).

Accordingly, I find that Civitella and O'Connor were agents and representatives of the Union.

Counsel for the Union contends that notwithstanding that the Union's insistence that discussions concerning grievances be tape-recorded there was no impasse reached and therefore no 8(b)(3) violation, citing *Pennsylvania Telephone*, *supra*. In fact *Pennsylvania Telephone* is very similar to the facts of the instant case. The issue framed by the Board was: "...whether a party may insist to impasse on tape recording a grievance meeting." The Board eloquently discusses this issue. In this regard the Board states as follows:

Typically, questions arising under collective-bargaining agreements are initially addressed by the parties by means of a grievance meeting. Grievance meetings may sift out unmeritorious claims and facilitate the settlement of disputes before any formal dispute resolution forum is utilized. Thus, grievance meetings are integral parts of the collective-bargaining process which are subject to the Act's requirement of good-faith bargaining.

Moreover, our examination, contrary to that of the judge, reveals that grievance meetings are similar to collective-bargaining negotiations in character and methodology. Like contract negotiations, a grievance meeting is an informal mechanism used to address employee concerns where the ultimate goal is to reach an agreement or settlement. Although grievance meetings and negotiation sessions may differ in the scope of matters to be discussed, both proceedings involve the trading of items or groups of items in order to obtain mutually acceptable agreements. Informal dialog between the parties regarding the means by which agreement can be reached is an essential element of both proceedings. Unlike adversary proceedings such as trials and arbitrations, grievance meetings do not normally have a judge to make findings of fact or conclusions of law or any provision for examination or cross-examination of witnesses. The goal is to reach an agreement or settlement.

Further, the same adverse effects on the bargaining process which might result from allowing a party to insist to impasse on a verbatim transcript of collective-bargaining negotiations would also be found in grievance meetings. *Bartlett-Collins*, *supra*, 237 NLRB 770 (1978) *enfd.* 639 F.2d 652 (10th Cir. 1981), *cert. denied* 452 U.S. 961 (1981). The presence of a recording device may

have a tendency to inhibit free and open discussions. This may be especially true when sensitive or confidential matters will be discussed. The spontaneity and flexibility which are commonly manifested during bargaining may be lost. Moreover, the important element of open and honest dialog may be replaced by a formalistic monologue of posturing and speechmaking. The informal nature of the grievance meeting would therefore be converted into a formalistic one where parties speak more for the record in anticipation of litigation rather than eventual settlement. While we are mindful that some grievance may proceed to arbitration and a verbatim record of grievance discussions may be helpful, the primary goal of grievance meetings is to adjust the grievance. This goal will more likely be accomplished when there is no chilling effect on the expression of views. Finally, disagreement over the threshold issue of whether a recording device can be used, which is preliminary and subordinate to substantive matters, may stifle bargaining from its inception. Therefore, we conclude that the need for an objective means of replicating facts is outweighed by the adverse effects on the bargaining process.

Because it is our statutory obligation to foster and encourage meaningful collective bargaining and the resolution of industrial disputes, we conclude that our ruling in *Bartlett-Collins* relating to collective-bargaining negotiations should be equally applicable to grievance meetings. Accordingly, we hold that a party fails to bargain in good faith by insisting to impasse on the use of a recording device during a grievance meeting.

As set forth above Padian had informal discussions with Union representatives only when they told him they were not recording such discussions. On the other hand, at the beginning of the November 5 store meetings, when the Union representatives told the store managers that they were taping the meetings, the store managers read a written statement, which included questions and answers. There was no informal discussion during the course of these meetings.

I find such conduct analogous to *Pennsylvania Telephone*. Accordingly, I conclude that the Unions' insistence on tape recording the November 5 meetings resulted in an impasse and constitutes a violation of Section 8(b)(3).

Counsel for the General Counsel submitted with its brief, a motion to strike a portion of Respondent's brief, including a copy of an arbitrator's decision which was not offered for introduction into evidence as an exhibit during the course of this trial, and an argument that certain individuals, Civitella and O'Connor, admitted by the Union in its answer to be agents of the Union were not agents of the Union.

With respect to the arbitrator's decision, since it was not offered as an exhibit during the course of the trial, the proper procedure for consideration of such document would be to move that the trial be re-opened. No such motion was made. In any event, I read the arbitrator's decision and find it irrelevant to this decision.

With respect to the Union's contention as to the agent status of Civitella and O'Connor set forth in its brief, I concluded as



set forth and fully discussed above that the Union was bound by its' answer.

#### CONCLUSIONS OF LAW

1. Pathmark Stores Inc. is an employer engaged in commerce within the meaning of 2(2), (6), and (7) of the Act.

2. Local 342-50, United Food and Commercial Workers Union, AFL-CIO is a labor organization within the meaning of Section 2(5) of the Act.

3. At all times material herein the Employer and the Union have been parties to a collective bargaining agreement covering the unit of employees set forth above, and at all times material herein the Union has been the exclusive collective-bargaining representative of the unit of employees described above.

4. The Union has restrained and coerced the Employer in the selection of its representatives for the purposes of collective bargaining and the adjustment of grievances in violation of Section 8(b)(1)(B) of the Act.

5. By insisting upon tape recording grievance discussions to impasse, the Union has violated Section 8(b)(3) of the Act.

#### REMEDY

Having found that the Union has violated the Act as set forth above, I shall recommend that it cease and desist there from, and take certain affirmative action set forth in my recommended<sup>2</sup>

#### ORDER

The Respondent, Local 342 United Food and Chemical Workers Union AFL-CIO, its' officers, agents and representatives shall

1. Cease and desist from

(a) Restraining and coercing Pathmark Stores Inc., the Employer herein in the selection of its representatives for the purposes of collective bargaining and the adjustment of grievances.

(b) Refusing to bargain in good faith with the Employer by insisting to impasse of a recording device during collective bargaining sessions or grievance meetings.

(c) In any other like or related manner, refusing to bargain in good faith with the Employer over the processing and adjustment of grievances.

2. Take the following affirmative action to effectuate the policies of the Act.

(a) Upon request as the exclusive representative of the unit of employees set forth above in this Decision, bargain in good faith with the Employer over the processing and adjustment of grievances filed pursuant to the collective-bargaining agreement between the parties, without insisting upon the use of a recording device.

(b) Within 14 days after service by the Region, post at its union office in *Mineola, New York* copies of the attached notice

marked "Appendix."<sup>3</sup> Copies of the notice, on forms provided by the Regional Director for Region 29, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to members are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(c) Sign and return to the Regional Director sufficient copies of the notice for posting by *Pathmark Stores* if willing, at all places where notices to employees are customarily posted.

(d) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

#### APPENDIX

##### NOTICE TO MEMBERS

##### POSTED BY ORDER OF THE

##### National Labor Relations Board

##### An Agency of the United States Government

The National Labor Relations Board had found that we violated Federal labor law and has ordered us to post and obey this notice.

#### FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities

WE WILL NOT restrain or coerce Pathmark Stores, Inc., the Employer herein in the selection of its representatives for the purpose of collective-bargaining or to make adjustments in grievances.

WE WILL NOT refuse to bargain in good faith by insisting to impasse of a recording device during grievance meetings.

WE WILL NOT refuse to bargain in good faith over the processing and the adjustment of grievances.

WE WILL bargain in good faith with the Employer over the processing and adjustment of grievances filed pursuant to the collective-bargaining agreement between the parties.

LOCAL 342, UNITED FOOD AND COMMERCIAL WORKERS UNION, AFL-CIO

<sup>2</sup> If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

<sup>3</sup> If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."